

December 9, 2002

Ms=2E Marlene H=2E Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, SW  
Room TW-A325  
Washington, DC 20554

Re: Notice of Proposed Rulemaking  
CG Docket No=2E 02-278

Dear Ms=2E Dortch:

Discover Bank is pleased to respond to the Federal Communications Commission's Notice of Proposed Rulemaking regarding the regulations implementing the Telephone Consumer Protection Act of 1991 ("TCPA")=2E We appreciate the opportunity to comment=2E

Discover Bank maintains total assets in excess of \$22 billion and is among the nation's largest issuers of general-purpose credit cards, as measured by number of accounts and Cardmembers=2E Discover Bank also offers deposit account services to customers across the country, and holds over \$13 billion in consumer deposits=2E Discover Bank, through an affiliate and through unaffiliated telemarketing firms, places telemarketing calls to its own customers, as well as to prospective customers=2E

1=2E Discover Bank Can Support the FCC's Proposed National "Do-Not-Call List" Only If Congress First Preempts State Regulation of Interstate and Intrastate Calls

Discover Bank strongly supports the right of consumers who do not wish to receive telemarketing calls to exercise that choice=2E Telemarketers are currently subject to two sets of federal regulations dealing with do-not-call requests: the existing Telemarketing Sales Rule and the FCC's rule implementing the Telephone Consumer Protection Act of 1991=2E In addition, telemarketers must comply with

numerous state laws  
dealing with do-not-call requests, some of which establish state-enforced  
do-not-call lists=2E  
The proliferation of these state do-not-call lists is making compliance  
an  
increasingly  
complicated and costly endeavor for telemarketers=2E

We believe that this issue is particularly suitable for a uniform  
national standard  
that would preempt state laws with respect to interstate and intrastate  
calls and that the  
FCC rather than the FTC is the proper agency to create that standard=2E

Congress has  
already granted the FCC authority to create and maintain a national  
do-not-call list, and  
Congress has preempted state regulation of interstate telemarketing cal  
ls=2E  
Congress'  
failure to preempt state regulation of intrastate calls, however, means  
that firms engaging  
in both interstate and intrastate calls must contend with a tangle of  
overlapping and  
inconsistent federal and state requirements=2E A new national list wit  
hout  
federal  
preemption regarding interstate and intrastate telemarketing calls wou  
ld  
simply  
complicate matters further for consumers and telemarketers and, therefo  
re,  
Discover  
Bank cannot support such a list=2E

a=2E We Believe State Regulation of Interstate Telemarketing Is  
Already  
Preempted

The Communications Act of 1934 preempts state "do-not-call" laws t  
hat  
by their  
terms apply to calls made in interstate commerce=2E The Act specifical  
ly  
reserves authority  
over interstate communications to the FCC, 47 U=2ES=2EC=2EA=2E =A7 152(  
a), while  
reserving to the  
states regulation of intrastate communications, 47 U=2ES=2EC=2EA=2E =A7  
152(b)=2E The  
legislative  
history of the amendments to the Act made by the Telephone Consumer  
Protection Act of  
1991, 47 U=2ES=2EC=2EA=2E =A7 227, further indicate a Congressional int

ent to preempt  
state laws  
that regulate interstate communications, while leaving in place state laws  
that provide  
greater consumer protection in intrastate communications=2E See, e=2Eg  
=2E, House  
Rep=2E No=2E 317,  
102d Cong=2E (1991)=2E The most direct statement on preemption of the  
TCPA was  
made in  
the Senate by Senator Hollings, then Chairman of the Senate Committee on  
Commerce,  
Science and Transportation and the original sponsor and driving force  
behind the  
enactment of the TCPA=2E While explaining the reasoning behind various  
provisions,  
Senator Hollings said: "Section 227(e)(1) clarifies that the bill is not  
intended to preempt  
State authority regarding intrastate communications except with respect  
to  
the technical  
standards under section 227(d) and subject to section 227(e)2)=2E Pursuant  
to the general  
preemptive effect of the Communications Act of 1934, state regulation of  
interstate  
communications, including interstate communications initiated for  
telemarketing  
purposes, is preempted=2E" 137 Cong=2E Rec=2E 17,874 (1991) (emphasis  
added)=2E

There is also ample case law support for preemption=2E For example,  
prior Supreme  
Court decisions found occupation of the field and thus preemption of state  
laws that  
purported to impose substantive restrictions on interstate telegraph and  
telegram  
transmissions=2E Western Union Co=2E v=2E Boegli, 251 U=2ES=2E 315 (1920); Postal  
Telegraph &  
Cable Co=2E v=2E Warren Goodwin Lumber Co=2E, 251 U=2ES=2E 27 (1919)=2E  
There are also  
analogous cases in the Circuit Courts that find in favor of preemption=2E

See, e=2Eg=2E, Ivy  
Broadcasting Co=2E v=2E AT&T, 391 F=2E2d 486 (2d Cir=2E 1968)=2E The United States  
Supreme  
Court later acknowledged that the Communications Act of 1934 "is a

comprehensive  
scheme for the regulation of interstate communications=2E" Benanti v=2E  
United  
States, 355  
U=2ES=2E 96, 104 (1957)=2E In addition, there is also FCC precedent co  
nfirning  
preemption=2E In  
1991, the FCC issued a release stating that interstate and foreign  
communications are  
totally entrusted to the FCC=2E FCC Release No=2E 91-185 (1991)=2E In  
terpretive  
letters issued  
by the FCC staff conclude that state "do-not-call" laws are preempted=2E  
See  
Letter dated  
Jan=2E 26, 1998 from Geraldine A=2E Matise, FCC, to Ronald A=2E Guns, M  
aryland  
House of  
Delegates and letter dated March 3, 1998 from Geraldine A=2E Matise, FC  
C, to  
Sanford L=2E  
Schenberg=2E The FCC should use this opportunity to reaffirm federal  
preemption in the  
area of interstate telemarketing calls and, as discussed above, obtain  
preemption authority  
from Congress with respect to intrastate calls=2E

b=2E Calls to Persons With Whom There is a Prior or Existing Bus  
iness  
Relationship Should be Exempt

The TCPA's definition of "telephone solicitation" excludes calls t  
o  
persons with  
whom the caller has an existing business relationship, and thus any rul  
es  
regarding a  
national list should explicitly reflect that such calls are exempted=2E

While the states have  
taken many different approaches in crafting "do-not-call" statutes,  
virtually all of them  
have exempted calls made to persons with whom the seller has an existin  
g  
business  
relationship=2E Generally, this exemption extends to both existing and  
former  
customers=2E  
There is good reason for such an exemption=2E Consumers benefit when  
companies they  
already know and trust contact them with offers for other, better or le  
ss  
expensive  
products or services=2E We are not aware of problems that have arisen u  
nder  
existing state  
laws or of consumer demands that the laws be amended to delete the

existing-customer  
exception=2E Consumers do not know in advance which of the companies t  
hey  
already do  
business with will have useful offers, so the proposal that consumers w  
ho  
register on the  
list grant express written and oral authorization in advance for  
telemarketing calls from  
specific companies is not helpful to consumers or telemarketers=2E Dis  
cover  
Bank's  
practice, which we believe is widely shared, of allowing customers to  
proactively add  
themselves to its internal do-not-call list also makes it unnecessary t  
o  
further regulate  
calls to our customers=2E

2=2E Discover Bank Supports Making Company-Specific Do-Not-Call Lists

Easier for Consumers

a=2E Proactive Requests from Consumers

The Proposal indicates that the FCC may consider alternative metho  
ds  
for  
allowing consumers to place themselves on a company-specific list, such  
as  
using the  
Internet or mail to submit a proactive request to be placed on a  
company-specific list=2E  
Discover Bank already provides consumers with the opportunity to make a  
proactive  
request to be placed on its internal do-not-call list, but is concerned  
that any legal  
requirement to permit consumers who are not customers to place themselv  
es  
on a  
company-specific list before receiving a telemarketing call would be  
extremely difficult  
to comply with due to the difficulty of matching names and updating  
telephone numbers  
of individuals with whom we have no business relationship=2E If compan  
ies  
were required  
to accept proactive requests, they should be permitted to designate how  
such requests  
must be registered in order to be made effective (e=2Eg=2E at a certain  
address, phone number  
and/or web site)=2E

The FCC should not require companies to respond to a consumer's request to be placed on a company-specific list=2E Such a requirement would be costly to implement and provide no real benefit to consumers=2E Upon making a request to be placed on a company-specific list, consumers have obvious reason to believe that their request will be implemented=2E If it is not, there are several remedies available, including state enforcement and private rights of action against the telemarketer, depending on the circumstances=2E We do not believe the cost to the industry can be justified=2E

#### b=2E Time Required to Implement

The FCC has requested comment as to whether consumers may continue to receive calls for some period of time after asking to be placed on a company-specific list=2E Complex processes are used to prepare telemarketing lists and run them against updated do-not-call lists=2E These lists are prepared with the assistance of multiple business units and vendors, and may be used by both in-house callers and outside telemarketing firms=2E Also, telemarketing campaigns frequently last 45-60 days, so that a "good" list could become inaccurate and unusable before a marketing campaign is completed=2E We suggest that companies be given a period of no less than 45 days to remove names from their internal lists=2E

#### c=2E Consumers with Disabilities

The FCC also requests comment on whether consumers with hearing and speech difficulties are able to convey a request not to be called by telemarketers=2E We are not aware of widespread problems in this regard=2E Discover Bank currently uses a telephone device for the deaf (TDD) and supplies that special telephone number on statements and letters=2E Consumers may use this channel to request not to be called,

and  
those requests  
are honored=2E Should the FCC determine that it must address this issue, we  
suggest that  
rather than create new requirements specific to those with disabilities  
,  
the FCC should  
rely upon the implementation of a national do-not-call list as the best  
means of mitigating  
the difficulties that disabled individuals may face with respect to placing  
themselves on a  
company-specific list=2E

### 3=2E Caller Identification Requirements are Impracticable

The Proposal seeks comment on whether telemarketers should be required  
to  
transmit caller identification information=2E We do not believe this is  
feasible or  
appropriate=2E Many telemarketers do not use telephone services that are  
capable of  
transmitting caller ID information=2E We do not believe it would be  
appropriate for the  
TCPA Rule to be amended in a manner that is not technology neutral,  
requiring  
telemarketers to use only certain types of telephone service providers=2E

Furthermore, such  
a "remedy" would be limited because it would benefit only those consumers  
who  
subscribe to caller ID services=2E

### 4=2E Predictive Dialers Improve Calling Efficiency and their Abuse Can Be Controlled

The Proposal seeks comment as to whether a predictive dialer is an  
"automatic  
telephone dialing system," or "autodialer," for purposes of the TCPA and  
TCPA Rule=2E  
An autodialer is defined in the TCPA and TCPA Rule as equipment which has  
the  
capacity to store or produce telephone numbers to be called using a random  
or sequential  
number generator and to dial such numbers=2E Under the TCPA Rule, an  
autodialer may

not be used to initiate a telephone call, with limited exceptions, to a  
ny  
emergency  
telephone line, the telephone line of any hospital guest room, or any  
telephone number  
assigned to a cellular telephone service or any service for which the  
called party is  
charged for the call=2E

We do not believe that a predictive dialer falls within the defini  
tion  
of an  
autodialer, nor do we believe there is reason to classify predictive  
dialers as such=2E A  
predictive dialer does not meet the definition of an autodialer because  
a  
predictive dialer  
generally does not store or generate telephone numbers to be called usi  
ng a  
random or  
sequential number generator=2E Rather, the primary function of a predi  
ctive  
dialer is to call  
a given set of purposefully selected telephone numbers in a manner that  
  
maximizes the  
efficiency of telemarketers=2E Furthermore, the TCPA Rule seeks to pre  
vent  
an autodialer  
from randomly calling an emergency line, hospital room, or a telephone  
for  
which the  
called party is charged for the call=2E Predictive dialers are general  
ly  
used to dial numbers  
the telemarketer intends to call, not those randomly generated which ma  
y  
include hospital  
rooms, etc=2E We are unaware of significant problems associated with t  
he use  
of predictive  
dialers in connection with calling these types of restricted telephone  
numbers, and  
therefore urge the FCC to refrain from classifying a predictive dialer  
as  
an autodialer=2E

The FCC has requested comment as to the proper regulation of aband  
oned  
calls  
from predictive dialers=2E As the FCC recognizes, a blanket prohibition  
on  
all abandoned  
calls would significantly increase the cost of telemarketing by reducin  
g  
the efficiency of  
every telemarketer's operations=2E Those costs inevitably would be pas



sed  
along to  
consumers in the form of higher prices=2E We believe the Direct Marketi  
ng  
Association's  
efforts to achieve industry self-regulation on this issue should be  
encouraged, and we  
support those efforts=2E If the FCC elects to adopt a rule change on t  
his  
subject, the FCC  
should expressly permit telemarketers to abandon a reasonably small  
percentage of calls  
(such as five per cent) without being considered in violation of the  
Telemarketing Sales  
Rule=2E

As an alternative to setting a maximum abandonment rate, the Propo  
sal  
seeks  
comment on whether requiring telemarketers who use predictive dialers t  
o  
also transmit  
caller identification information is a feasible option=2E For the reas  
ons  
given above, we do  
not believe that requiring telemarketers to transmit caller ID informat  
ion  
would be  
technically feasible or appropriate=2E

#### 5=2E Answering Machine Detection Restrictions Are Inappropriate

Some telemarketers make use of answering machine detection technol  
ogy  
("AMD")=2E If used in conjunction with an autodialer or a predictive d  
ialer,  
AMD can help  
prevent a call answered by an answering machine from being transferred  
to a  
telemarketer=2E For example, an AMD may transfer a call to a telemarke  
ter  
only if it  
detects noise and then silence, such as when a person says "hello," but  
not  
transfer calls  
that are answered by continuous noise, such as when an answering machin  
e  
answers the  
call=2E This process greatly improves the efficiency of telemarketers  
but  
may result in the  
consumer hearing a short period of silence as the call is connected to  
a  
telemarketer=2E

We do not believe that consumers are frustrated with the use of AM  
D,

which  
results in only a slight pause (if any) before a telemarketer takes the

line=2E To the extent  
consumers may be frustrated by "dead air," we believe that such frustra-  
tion  
is a result of  
a small number of telemarketers abusing the use of a predictive dialer  
and  
abandoning too  
many calls=2E In light of the efficiencies created by not connecting  
telemarketers to  
answering machines, we do not believe that restrictions on the use of A  
MD  
would be  
appropriate=2E To restrict or eliminate the use of AMD would only incr-  
ease  
the cost of  
telemarketing with no corresponding benefit provided to consumers=2E

6=2E Calls to Wireless Telephones Do Not Require Additional Regulation

The FCC seeks comment on the extent to which telemarketing to wire-  
less  
telephone consumers exists today and whether revisions to the TCPA are  
necessary to  
reflect consumers' growing dependence on wireless phones=2E Discover B  
ank  
does not  
"target" wireless telephone numbers for telemarketing calls=2E In fact  
, it  
is inherently  
difficult to distinguish between wireless and ordinary phone numbers=2E

However, if a  
consumer has listed his or her wireless telephone number as the number  
at  
which that  
person would like to be called, it is possible that the consumer could  
receive a  
telemarketing call on the wireless telephone=2E

The FCC has asked whether wireless numbers, or a subset thereof,  
should be  
considered "residential telephone numbers" under the TCPA Rule, thereby

making calls  
to wireless numbers subject to the time of day restrictions and the  
company-specific list  
requirement=2E We do not believe that such a classification is appropri-  
ate  
or necessary=2E A  
wireless phone provides many consumers the flexibility to use their  
telephones for a  
variety of purposes=2E For example, a consumer may use a wireless phon-  
e

during the day  
for business purposes and use it during the evening and on weekends for  
personal  
reasons=2E It would not be possible to classify such numbers appropri-  
ately  
as strictly  
"residential" or not=2E Furthermore, we urge the FCC to keep in mind the  
context in which  
many telemarketers obtain a wireless phone number=2E Telemarketers gen-  
erally  
call a  
wireless phone number because the consumer has listed it as his or her  
primary phone  
number=2E For this reason, and since telemarketers cannot generally  
distinguish between a  
wireless and a wireline number, telemarketers generally assume that such  
numbers are  
"residential telephone numbers" and treat them accordingly, i=2Ee=2E  
telemarketers generally  
call the number only between 8 a=2Em=2E and 9 p=2Em=2E and apply the  
company-specific list  
requirements to it=2E

We also note that the use of wireless telephones continues to evolve=2E  
Therefore,  
the FCC should use caution when reviewing proposed amendments to the TCPA  
Rule  
that would address wireless telephones=2E Since wireless numbers are  
generally not  
targeted, and since they usually receive protections as though they were  
"residential  
telephone numbers," we do not believe that significant benefits can be  
obtained by  
amending the TCPA Rule to address wireless telephone issues=2E On the  
other  
hand, since  
the wireless telephone marketplace has not yet reached maturity, there  
is a  
risk that the  
FCC could stifle the evolution of mobile commerce or other benefits if  
it  
made premature  
amendments to the TCPA Rule covering wireless telephones=2E

Again, we appreciate the opportunity to comment on these issues=2E  
We  
would be  
pleased to provide any further information you may need regarding these  
comments=2E

Respectfully submitted,

Discover Bank

K=2E M=2E Roberts  
President